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SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 807

INTERNATIONAL SHOE COMPANY,

Petitioner

versus

RUFUS W. FONTENOT, Collector of Revenue, State of Louisiana,

Respondent

Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

---

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March 20, 1959

Franklin Press, Inc. — *Baton Rouge, La.*

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SUPREME COURT OF THE UNITED STATES

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---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, International Shoe Company, prays that a writ of certiorari to be issued, to review the final judgment of the Supreme Court of the State of Louisiana, which affirmed the judgment of the Nineteenth Judicial District Court, State of Louisiana, Parish of East Baton Rouge, rejecting plaintiff's demands for a refund of state income taxes.

CITATIONS TO OPINIONS BELOW

The opinion of the trial court (19th Judicial District Court) is unreported, but appears on pages 26-27 of the record of this case, and is printed, together with the judgment of the trial court, as Appendix "A" hereto, infra, p. 20.

The opinion of the Louisiana Supreme Court is reported in 107 So. 2d 640, and appears in the record (R. 40) and is printed as Appendix "B" hereto, infra, p. 23.

JURISDICTION

(1) The judgment of the Supreme Court of the State of Louisiana was entered on December 15, 1958. R. 40; p. 23, infra. Rehearing was denied on January 12, 1959 (R. 45), application therefor having been timely filed on December 24, 1958. (R. 42)

(2) The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257, which provides, in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

(3) The Supreme Court of the State of Louisiana is the highest court in that state, and the judgment of which review is sought is a final judgment of the Supreme Court of the State of Louisiana.

(4) The federal questions presented are quite similar to those involved in two recent cases considered by this Court, and determined by opinion rendered on February 24, 1959, namely,

Northwestern States Portland Cement Company v. State of Minnesota ____U.S.____, ____S.Ct.____, No. 12, Oct. Term, 1958, and

T. V. Williams, State Revenue Commissioner v. Stockham Valves and Fittings, Inc., ____U.S.____, ____S.Ct. ____, No. 33, Oct. Term, 1958.

In both of those cases, and in the instant case, the basic issue is whether or not a state may constitutionally levy a state income tax upon the income derived from sales within that state where the company taxed (a foreign corporation) was ". . . at all pertinent times engaged solely in interstate commerce." (R. 19)

The primary distinction between those two cases, and the present case, lies in the fact that, in each of those decided cases, the taxpayer maintained an office, and place of business, in the taxing state, whereas—in the case now at bar—International Shoe Company ". . . had no office, storage space, warehouse, or other place of business in Louisiana, . . ." and had no activities whatsoever, in the State of Louisiana, except that fifteen salesmen ". . . regularly and systematically solicited orders from customers and prospective customers (re-

tail shoe dealers)." See Stipulation of Facts, especially paragraphs 3, 6, 7, 12, 13 and 14 (R. 19-21).

(5) At issue here is the federal question of whether or not the Louisiana statute, imposing the income tax, as applied to this case, is in conflict with and contravenes the Due Process clause of the Fourteenth Amendment of the Constitution of the United States.

(6) Also at issue here is the federal question of whether or not the attempt of the State of Louisiana, to impose a tax upon the net income of International Shoe Company, a foreign corporation, not qualified to do business in Louisiana, and whose business consists exclusively of interstate commerce, violates the commerce clause (Art. I, Sec. 8, cl. 3) of the Constitution of the United States.

(7) The federal questions here at issue have been more fully stated in the dissenting opinion of Mr. Justice Whitaker, Mr. Justice Frankfurter and Mr. Justice Stewart in the two cases above cited, which dissenting opinion is hereby adopted by reference. It is the position of petitioner (respectfully) **first** that the majority opinion of the Supreme Court was in error; that the dissenting opinion reached the correct and proper conclusion; and, **second**, in the alternative, that the present case is distinguishable from the two cited cases for the reason, *inter alia*, that International Shoe Company ". . . had no office, storage space, warehouse or other place of business in Louisiana . . ." Stipulation par. 7. (R. 20).

In the *Northwestern States Portland Cement Company* case, the taxpayer ". . . maintained in Minneapolis a leased sales office, equipped with its own furniture and fixtures and

under the supervision of an employee-salesman known as 'district manager' . . . ." It was out of this Minnesota office that the taxpayer's salesmen operated to solicit their orders.

In the *Stockham Valves and Fittings* case, the taxpayer "did maintain a sales-service office in Atlanta [Georgia], which served five states . . ." and which was the "headquarters" out of which the solicitation of orders was carried on by salesmen.

In all cases of this sort, the issue is necessarily one of degree. In the two cited cases, this Court held that the activities of the corporation within the taxing state did result ". . . in **substantial** income-producing activity in the taxing states. . . ." and created a "sufficient nexus" so as to justify the exaction of the tax.

The federal question here (still unresolved) is whether, in the absence of any office, warehouse, or place of business whatsoever, within the taxing state, the mere solicitation of orders, by traveling salesmen or "missionary men," solely in interstate commerce" is a **"sufficient** nexus," whether or not it is such **"substantial"** activity, as to support the state income tax, on such interstate commerce, as constitutional.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions, and statutes involved herein are:

(1) The "Due Process Clause" of Section 1 of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

"No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) The "Commerce Clause" of the Constitution of the United States, Article I, Sec 8, (Cl. 1 and 3)

Sec 8, Clause 1. *Powers of Congress.*

"The Congress shall have Power . . .

Sec 8, Clause 3.

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ."

(3) The Louisiana Income Tax laws here at issue are appended hereto as Appendix "C", and are: Louisiana Revised Statutes of 1950, R.S. 47:241; R.S. 47:244; R.S. 246B; R.S. 47:245; R.S. 47:31(4); and R.S. 47:1576.

STATEMENT OF THE CASE

This case is essentially similar to the *Minnesota* and *Georgia* cases, decided by this Court on February 24, 1959, namely,

Northwestern States Portland Cement Company v. State of Minnesota, ____ U.S. ____, ____ S.Ct. ____, No. 12, Oct. Term, 1958, and

T. V. Williams, State Revenue Commissioner v. Stockham Valves and Fittings, Inc., ____ U.S. ____, ____ S.Ct. ____, No. 33, Oct. Term, 1958.

The State of Louisiana has levied a direct income tax upon the petitioner pursuant to an apportionment formula, which formula, as such, is not now attacked by the petitioner. Petitioner paid under protest and sued for refund. The sole issue in the Louisiana courts, and the sole issue here, is whether or not the imposition of such a direct net income tax upon a foreign corporation, not authorized to do business in Louisiana, and having no office, warehouse or place of business whatsoever in Louisiana, is violative of the Commerce Clause and/or the Due Process Clause of the Constitution of the United States, above-cited.

The case was submitted below upon a Stipulation of Facts (R. 18-21), and among the facts stipulated were the following:

(3) "The Company at all pertinent times was engaged solely in interstate commerce in the State of Louisiana."

(6) "The Company at all pertinent times, sold its merchandise through salesmen who regularly and systematically solicited retailers and prospective retailers in the various states of the United States.

(7) "The Company at all pertinent times **had no office, storage space, warehouse, or other place of business in Louisiana** and was not qualified to do business

therein, and performed no manufacturing in Louisiana, either directly or indirectly."

• • •

(10) "The Company at all pertinent times had no property in Louisiana other than the samples of shoes in the custody of its salesmen who solicited Louisiana and the company-owned automobiles used by such salesmen. . . .

(11) "For the fiscal years 1951, 1952, and 1953 the fifteen (15) salesmen who regularly and systematically solicited retailers in Louisiana . . . .

(12) "At all pertinent times orders for all merchandise were transmitted without the State for acceptance or rejection in states other than Louisiana, and all goods to fill Louisiana orders were shipped from warehouses without the State.

(13) "At all pertinent times, **the activities of the Company in Louisiana consisted solely of the regular and systematic solicitation of orders by fifteen (15) salesmen** in the following manner:

(a) The salesmen regularly and systematically solicited orders from customers and prospective customers (retail shoe dealers).

(b) The salesmen displayed samples in Louisiana, making use of hotel rooms or rooms of a public building which have sample rooms available for salesmen.

(c) The expense of such display rooms was paid by the Company.

(d) Complaints by customers are communicated to and handled by the Company's place of business, to which salesmen sent their orders and from which orders are filled, i.e., in the years in question, St. Louis, Missouri, and Manchester, New Hampshire.

(e) Delinquent accounts are at all times handled by Credit Departments of the Company located in St. Louis, Missouri, and in Manchester, New Hampshire, where orders are originally approved for shipment, where records pertaining to accounts are kept and where all accounts are payable.

(14) "The Company had no activities (directly or indirectly) in Louisiana other than those set forth in paragraph 13 above, nor did it have any other connections whatsoever with the State of Louisiana other than those specifically stipulated herein."

Petitioner adopts the dissenting opinion of Mr. Justice Whitaker, Mr. Justice Frankfurter and Mr. Justice Stewart, in the *Georgia* and *Minnesota* cases as its basic argument. Petitioner submits that the rationale of that dissent is correct; that the majority opinion is in error.

Petitioner further submits, however, that the present case is soundly distinguishable from the *Georgia* and *Minnesota* cases in the fact that petitioner had, in the taxing state, no office, no warehouse, nor any place of business of any kind whatsoever.

In the *Georgia* and *Minnesota* cases, both taxpayers maintained offices and places of business within the taxing state,

out of which their solicitors operated. And this Court found that, in those cases, there was a "**sufficient nexus** to support . . ." the taxation.

Following the doctrine of those cases, we would conclude that (1) the systematic solicitation within a state, of orders, in interstate commerce, **plus** (2) the maintenance of an office within that state, is "sufficient nexus" to support the taxation of income resulting from such sales.

Suppose the foreign corporation never entered a state, but solicited its orders entirely through the mails or by advertisements in magazines. We take it that this would not be a "sufficient nexus" to support the state income tax.

Suppose, again, that the agent of the selling corporation stood at the state line and, by raising his voice solicited an order across the state line. Again we gather that there would not be a "sufficient nexus" with the state wherein the order was solicited, to support the taxation.

Suppose, the out-of-state agent raised his voice by means of the telephone, the radio, or by television via coaxial cable from Hollywood, to New York, to Louisiana, would there be a "sufficient nexus" to justify a Louisiana income tax upon the resultant sales, in Louisiana where the soliciting agent (salesman) never put his foot across the state line? We gather that there would not be.

The case at bar is one step further. Instead of raising his voice (physically, or by means of a TV network), the soliciting agents of present petitioner have actually stepped across the state line and have solicited orders, in Louisiana, by calling

upon the prospective customers and displaying their wares (shoes). Is this, standing alone, a "sufficient nexus"?

Unlike the *Georgia* and *Minnesota* cases, where a regular "office" was set up within the taxing state, present petitioner had **no office,** and no place of business whatsoever, in Louisiana.

Query: Does this Court hold that a salesman, shouting across the state line, does not generate a taxable situation, but that—if he steps across that line—he submits his employer to a new income tax?

Granted, that the Georgia and Minnesota decisions, by this Court, held that crossing the state line, **and** establishing a regular and permanent office, and business establishment, within the state create a "sufficient nexus" to support the tax. Does the act of crossing the state line to solicit the order, standing alone, create such a "nexus"?

The Georgia and Minnesota decisions have been so interpreted by the public.

The Kiplinger Washington Letter, of March 7, 1959, states:

> **"State income taxes on interstate business:** Recent decisions by the Supreme Court are stirring up a hornets' nest among tax lawyers. Court says any state may tax a company on income earned in the state, **even if the company has no office, inventories or facilities there.** The effect could become widespread, for 25 states already have laws that could subject taxpayers to this new kind of double taxation.

"Many questions arise: May cities as well as states tax income from interstate business? Book clubs? Mail-order and catalog sales? Cattle and grain, or other goods shipped into a state for sale there?

"Tax lawyers are appalled at this new Pandora's box of troubles.

"Two possibilities for amelioration: (1) Some further tax cases in which the Supreme Court may limit or define the state taxing power. (2) Action by Congress under the commerce clause. The need to act is being discussed within Congress, but as yet there is no real plan.

"Meanwhile, many state and local gov'ts are looking for money. They're hard pressed . . . must find ways to pay for rising community needs. So it seems probable that they will move fast on this new tax source.

"Better alert your tax counsel to watch the situation."

And, Commerce Clearing House, Inc., publishers of a service on State Tax laws, advertise their services currently, as follows:

"HOW MANY MUST YOU PAY NOW?

"Touching off a **titanic new trend** in state taxes, the U. S. Supreme Court has just OK'd state income taxes on corporations operating interstate, even though their business activity in the taxing state is **exclusively** in interstate commerce! The effects will be felt from coast to coast, from border to border.

"And nearly three dozen revenue-hungry states, with corporation income taxes, are rarin' to scoop in big new

revenues under this privilege bestowed by the High Tribunal.

"Now—with all the 'income tax states' already set up or readying new rules for taxing on an 'apportionment basis' business income earned in interstate activities—companies with multi-state operations will be paying literally millions more in state income taxes!

"How are the state tax liabilities of the interests you represent going to be affected?

"Are you all set to step ahead with confidence under this huge new burden of responsibility? Do you know what to expect, state-tax-wise—what to do now and later to minimize this ballooning new income tax obligation?"

Similarly, the Prentice Hall "Tax Ideas" service (Vol. VI, No. 6, p. 3) has alerted its subscribers:

"The Bars Are Down—Interstate Income Is Taxable

"The Supreme Court of the United States has signaled a new era in taxing interstate income in two historic decisions "to clear up the tangled underbrush" of past cases. In the wake of these decisions, noted legal authorities foresee the strewn wreckage of many borderline businesses already courting financial disaster.

"The holding: In short, this is what the majority of Justices decided: Net income from the interstate operations of an out-of-state enterprise may be taxed by a state if (1) the levy is not discriminatory and (2) it is properly apportioned to local activities within the taxing state, and (3) the local activities constitute a sufficient

'nexus' (minimum contact) to support the tax. In so holding, the Court sustained taxes imposed by Minnesota and Georgia on corporations admittedly engaged *exclusively* in interstate commerce [Northwestern Portland Cement v. Minn.; Williams v. Stockham Valves, 2/24/59].

"PROPHETS OF DOOM"— It isn't necessary to indulge in fantasy to predict the extensive consequences of these cases. Here's what Justice Frankfurter sees in the immediate future:

> "'*Thousands of small and moderate size businesses doing exclusively interstate business spread over various states will be subjected to these new requirements*—
>
> "'● File a separate income tax return in each state taxing income.
>
> "'● Keep additional books; store additional records.
>
> "'● Engage legal counsel, to meet the variegated tax laws of the states taxing income.
>
> "'● Comply with different deadlines for filing, different tax structures, different modes for determining 'net income,' and the use of different (often conflicting) formulas of apportionment.
>
> "'● Increase bookkeeping and accounting staffs to meet these new demands.
>
> "'● Budget the cost of all these things, well in excess of the burden of the taxes themselves.'

"Ahead for the States: The decisions will stimulate, if indeed they do not compel, every state of the union which has not already done so, to enact an effective income tax law and devise a formula for apportionment to tax the income of enterprises carrying on exclusively interstate commerce. *Thus, interstate commerce will be burdened not hypothetically but practically."*

The public is being told, therefore, that the mere presence of a soliciting salesman, or "missionary man," within a state, without an office or place of business in the state, is "sufficient nexus" to support a direct net income tax, levied by that state, upon the income from any resulting sale.

Yet, the majority opinion in the *Georgia* and *Minnesota* cases, did not so hold. In each of those cases, this Court carefully pointed out that the taxpayer did maintain an office within the taxing state. Query: Was not this the factor which, considered together with the solicitation of orders, was held to be a "sufficient nexus" to support income taxation?

It is respectfully submitted that the thousands and thousands of business concerns, engaged "solely in interstate commerce" throughout this country, are entitled to know—with certainty—whether this Court intended its decision to be so interpreted.

We submit that certiorari should be granted herein, so that this Honorable Court can articulate, in unequivocal terms, the answer to the still unresolved question.

Where is the dividing line? Surely the solicitation of orders (across a state line) by mail, by radio, by TV, by the raised voice at the state line (without crossing that line) is not a "sufficient nexus" to support the income taxation. Query: Is the additional act of having the salesman put his foot across that line . . . (such a simple act). . . . Is such a simple act (standing alone and of itself) enough additional activity to create a "sufficient nexus" to support the state income tax?

The question cries for a negative answer.

But, regardless of whether the answer be negative or positive, surely the taxed American public (in these arduous tax times) is entitled to know the answer with certainty.

Now such a taxpayer can only guess at the answer. Your Honors have—in the present case—an opportunity to clarify this vastly important issue.

We submit that certiorari should be granted to permit this Court to answer the question in words of one syllable.

HOW THE ISSUES WERE RAISED BELOW

The constitutional issues here in question were raised in the trial court by the original pleadings, by the stipulation of facts, and by brief. In the Louisiana Supreme Court, the issues were raised by brief and oral argument. The entire case was directed solely at these constitutional issues and no other issue was ever involved in the case at any time. Both Louisiana courts rejected these contentions, on constitutional

grounds. There was no other issue. See original Petition (R. 6-10); Opinion of Trial Court (R. 26-27, Infra, p. 20) and Opinion of the Supreme Court of Louisiana (R. 40-41, infra p. 23).

ARGUMENTS AND AUTHORITIES

Since this Court has so recently considered the jurisprudence in this field, we submit no additional argument and authorities. We adopt by reference (as our argument) the dissenting opinion of Mr. Justice Whitaker, Mr. Justice Frankfurter and Mr. Justice Stewart, in the *Georgia* and *Minnesota* cases cited above. Further, we respectfully submit that the mere act of a traveling salesman, in entering a state to solicit his orders (as distinguished from solicitation by mail, phone, radio, TV, or voice raised across a state line), ought not to be considered a "sufficient nexus" to support a state income tax.

Even if it be granted that entry into a state, by salesmen, **plus** the creation in that state of a regular office and place of business (out of which such salesmen would operate) might be a "sufficient nexus," as Your Honors have already held, surely the mere physical entry (by a salesman) into the state to solicit the order (**without** the creation of such an office or place of business in the state) is not such a "sufficient nexus."

The line must be drawn somewhere, or the Constitutional guarantees are meaningless. But, surely the line should not be drawn so as to make the salesmen stop in their tracks when they come to a state line.

If the line be so drawn, it will in many cases result merely in a change of method of doing business. There will be more printed advertisements, more radio and TV—and the traveling salesmen will simply be "out of a job." Salesmen who do travel, wherever possible, will stop at state lines and will shout their solicitations across the state line (by mail, phone, radio, TV, or the raised voice). They will apply their brakes. They will not step across the **tax barrier** of the state line. Could a more graphic picture of burdened interstate commerce be painted? Can this be due process of law?

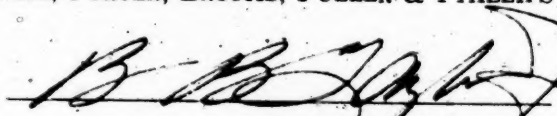
We submit that certiorari should be granted to afford this Court an opportunity to say whether or not it intended its earlier decisions, in the *Georgia* and *Minnesota* cases, to be so interpreted.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for certiorari should be granted.

Respectfully submitted,

TAYLOR, PORTER, BROOKS, FULLER & PHILLIPS

By 

B. B. TAYLOR, JR.
Counsel of Record

Baton Rouge, Louisiana

March 20, 1959.

CERTIFICATE

I, of counsel for petitioners, do hereby certify that I have this day served a copy of the foregoing petition for writ of certiorari by mailing same, postage prepaid, to counsel of record for plaintiff as follows:

Mr. Robert F. Roland

Formerly General Counsel for Collector of Revenue,
Now the Collector of Revenue, State of Louisiana

State Capitol Annex Building
Baton Rouge, Louisiana

Dated this 20th day of March, 1959.

Of Counsel

APPENDIX "A"

REASONS FOR JUDGMENT

Dated May 1, 1958 Filed May 1, 1958

INTERNATIONAL SHOE CO.	Number 51,352, Division "B"
vs.	Nineteenth Judicial
RUFUS W. FONTENOT, Collector of Revenue of the State of Louisiana	District Court Parish of East Baton Rouge State of Louisiana

Plaintiff herein, under protest, paid to the State of Louisiana for the years 1951, 1952 and 1953 the sum of $4,554.98 for income taxes asserted by the State for those years.

Having paid the claims, Plaintiff instituted this suit for a refund, contending that the Plaintiff, a foreign corporation, is engaged in interstate commerce and that the imposition of the income tax by the State of Louisiana places an unconstitutional burden on Plaintiff so engaged in interstate commerce and such a tax violates the due process clause of the Constitution.

It was stipulated by and between Plaintiff and the State of Louisiana that the Plaintiff manufactures shoes outside of Louisiana, stores them outside of Louisiana, operates its offices, warehouses and all of its places of business outside of the State of Louisiana and that its sole activity within the State of Louisiana consists exclusively in the regular and systematic solicitation and obtaining of orders for its product in the State of Louisiana by fifteen salesmen. Therefore, the only doing of business within the State of Louisiana by Plaintiff is restricted to the solicitation, et cetera as aforesaid, by the salesmen of Plaintiff.

The amounts collected because of the imposition of the tax are stipulated to be correct. So, the only issue before the Court is the determination of the constitutionality and the applicability of the income tax law to Plaintiff.

Rightfully or wrongfully, but most assuredly, in fact, the question presented by this suit was decided by the Supreme Court of this State contrary to the contentions of Plaintiff in the cases of Fontenot v. John I. Hay Company, 84 So. 2d. 810 and Brown-Forman Distillers Corporation v. Collector of Revenue, 101 So. 2d. 70, on February 10, 1958 and rehearing refused March 17, 1958.

Therefore, because of the solicitation and obtaining of orders for merchandise in the State by the salesmen of Plaintiff, Plaintiff, International Shoe Company, is deriving income from sources within the State of Louisiana and is liable for the taxes levied by the State under the income tax law, and such tax does not result in an unconstitutional burden on interstate commerce and does not conflict with the commerce clause thereof.

Accordingly, and for these reasons, judgment is rendered and will be signed in favor of the Defendant, and against the Plaintiff, rejecting the demands of the Plaintiff and dismissing its suit at its costs.

Baton Rouge, Louisiana, this May 1st, 1958.

(*Signed*): G. CALDWELL HERGET, Judge
Nineteenth Judicial District Court

JUDGMENT

Dated May 2, 1958 Filed May 2, 1958

INTERNATIONAL SHOE CO.	:	
vs.	:	Number 51,352 Division "B"
RUFUS W. FONTENOT,	:	Nineteenth Judicial
Collector of Revenue of	:	District Court
the State of Louisiana	:	Parish of East Baton Rouge
	:	State of Louisiana

JUDGMENT

This cause having been duly heard and submitted to the Court for adjudication, and the Court considering the law and evidence to be in favor of the Defendant for the reasons contained in the written opinion of this Court dated the 1st day of May, 1958,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Defendant, James S. Reily, Collector of Revenue, State of Louisiana, and against the Plaintiff, International Shoe Company, dismissing this action at Plaintiff's cost.

Judgment rendered in open Court on the 1st day of May, 1958.

Judgment read and signed in open Court this 2nd day of May, 1958, at Baton Rouge, Louisiana.

(*Signed*): G. CALDWELL HERGET, Judge
Nineteenth Judicial District Court

APPENDIX "B"

SUPREME COURT OF LOUISIANA

No. 44,126

International Shoe Company

v.

Rufus W. Fontenot, Collector of Revenue of the State of Louisiana

---

On Appeal from the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, Honorable G. Caldwell Herget, Judge.

PONDER, JUSTICE.

In this suit the plaintiff seeks to recover, under the provisions of R.S. 47:1576, a refund of income taxes paid under protest for the years, 1951 to 1953, inclusive. The lower court rejected the plaintiff's demands and it has appealed.

The suit was tried on a stipulation of facts to the effect that the plaintiff corporation was organized under the laws of Delaware with its principal place of business in St. Louis, Missouri. The plaintiff manufactures shoes and operates its offices, warehouses, and all of its business outside of the State of Louisiana. Its sole activity within this state consists of the regular and systematic solicitation of orders for its product by fifteen salesmen.

The appellant contends that the Collector was without authority to levy the taxes under the provisions of R.S. 47:21, et seq. for the reasons that it violates the commerce clause and the due process clause of the Federal Constitution, in other words, that the imposition of the tax unconstitutionally burdens interstate commerce and deprives appellant of due process. These contentions were disposed of by the trial judge in the following manner:

> "Rightfully or wrongfully, but most assuredly, in fact, the question presented by this suit was decided by the Supreme Court of this State contrary to the contentions of Plaintiff in the cases of Fontenot v. John I. Hay Company, (228 La. 1031) 84 So. 2d. 810 and Brown-Forman Distillers Corporation v. Collector of Revenue, (234 La. 651) 101 So. 2d. 70, 1958." (La. Citations supplied)

Appellant recognizes that the issues presented herein were decided adversely to its contention in the Hay and Brown-Forman cases but asks this Court to reconsider our holding in those cases. Appellant contends in the alternative that these cases are distinguishable from the case under consideration.

From an examination of the Hay case, we find that the identical contentions raised herein were urged therein and the issues were decided adversely to appellant's contention. Although it was not contended in the Brown-Forman case that the imposition of a similar income tax was violative of the due process clause, yet the court considered such contention and arrived at the conclusion that it was without merit, citing International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 and West Publishing Co. vs. McColgan, 328 U.S. 823, 66 S. Ct. 1387, 90 L.Ed 1603.

We have reviewed the Brown-Forman and the Hay cases and find that they are decisive of the issues herein presented

and feel that the conclusions reached therein should be affirmed. It would serve no useful purpose to reiterate the reasons upon which these conclusions were based.

For the reasons assigned, the judgment of the lower court is affirmed at the cost of the appellant.

APPENDIX "C"

Louisiana Statutes Involved.

La. R.S. 47:241:

"The net income of a nonresident individual or foreign corporation subject to the tax imposed by this Chapter shall be the sum of the *net allocable income earned within or derived from sources within this state*, as defined in R.S. 47:243, *and* the *net apportionable income derived from sources in this state*, as defined in R.S. 47:244, less the amount of federal income taxes attributable to the net allocable income and net apportionable income derived from sources in this state. * * *"

La. R.S. 47:244:

"* * *

"The net apportionable income derived from sources in this state shall be computed by multiplying the total net apportionable income by the Louisiana apportionment per cent determined in accordance with the provisions of R.S. 47:245.

* * *"

La. R.S. 47:246 B:

"Sales secured through efforts of sales organization of the taxpayer. Sales which are made by the taxpayer upon orders secured through the efforts of salesman or sales agents of the taxpayer including all sales not covered by Sub-section A of this Section, shall be attributed within or without or partly within and partly without this state by means of a formula giving weight to the various factors associated with such sales, as follows:

"(1) Securing the order. Fifty per centum (50%) of such sales shall be attributed to the state in which is located the office or other place of business to which is attached the salesman or agent who secured the order. However, if the customer is located in another state, and the salesman solicited the order there, then one-half of the fifty per centum (50%) shall be attributed to such other state. Fifty per centum (50%) of sales made upon orders secured by mail shall be attributed to the state in which is located the place at which the order is received by the taxpayer or an officer, agent, or employee of the taxpayer.

"(2) Filling the order. Twenty-five per centum (25%) of such sales shall be attributed to the state in which is located the place from which the taxpayer ships the merchandise or products to the purchaser.

"(3) Location of purchaser. Twenty-five per centum (25%) of such sales shall be attributed to the state in which is located the place at which the purchaser receives the merchandise or products."

La. R.S. 47:245:

"F. Manufacturing, merchandising and other business. The Louisiana apportionment per cent of any tax-

payer whose net apportionable income is derived primarily from a business or manufacturing or merchandising or from any other business not included in Sub-sections A through E, shall be the arithmetical average of three ratios, as follows:

"(1) The ratio of the value of the immovable and corporeal movable property owned by the taxpayer and located in Louisiana, to the value of all immovable and corporeal movable property owned by the taxpayer and used in the production of the net apportionable income.

"(2) The ratio of the amount paid by the taxpayer for salaries, wages, and other compensation for personal services rendered in this state, to the total amount paid by the taxpayer for salaries, wages, and other compensasation for personal services in connection with the production of net apportionable income; and

"(3) The ratio of net sales made in the regular course of business and other gross apportionable income attributable to this state to the total net sales made in the regular course of business and other gross apportionable income of the taxpayer.

"For the purpose of this Sub-section sales attributable to this state shall be all sales where the goods, merchandise or property is received in this state by purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. However, direct delivery into this state by the taxpayer to a person or firm designated by a purchaser from within or without the state shall constitute delivery to the purchaser in this state."

La. R.S. 47:31(4):

"Foreign corporations. Foreign corporations shall be taxed on net income from sources within the state, as hereinafter set out."

La. R.S. 47:1576:

"A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

"This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Sub-title, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

"This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

"Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided."

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 807

INTERNATIONAL SHOE COMPANY, PETITIONER

vs.

RUFUS W. FONTENOT (SINCE SUCCEEDED BY JAMES S. REILY, WHO IN TURN HAS BEEN SUCCEEDED BY ROBERT L. ROLAND), COLLECTOR OF REVENUE, STATE OF LOUISIANA, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana

BRIEF FOR RESPONDENT IN OPPOSITION

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Louisiana Department of Revenue

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BRIEF FOR RESPONDENT IN OPPOSITION

May it please the Court:

STATEMENT

This is an application for a review, by certiorari, of a final judgment and decree of the Supreme Court of Louisiana.

Petitioner paid certain *net income* taxes under protest and instituted suit for recovery thereof, all pursuant to Section 1576 of the Louisiana Revised Statutes of 1950.

The facts were stipulated. (R18-21). Petitioner is a foreign corporation engaged in the manufac-

ture and sale of shoes. It sells shoes to Louisiana customers through orders obtained by a regular and systematic solicitation of the Louisiana customers by its fifteen salesmen covering this territory. In this activity, the salesmen display samples in Louisiana, making use of rented hotel rooms or rooms of a public building which have sample rooms available for salesmen. The expense of all such rooms is paid by the company. During the three years in question, petitioner's Louisiana activity resulted in sales totaling $15,497,017.00. However, the contracts of sale were all accepted or rejected outside the state and all orders were filled from outside the state. Petitioner admitted and stipulated that the measure or apportionment is correct, and that the taxes have been correctly determined, if, in fact, they can be constitutionally imposed.

As appears from Appendix I of this brief, the moneys involved were transferred from a segregated account into the State Treasury, some 43 days *after* the decision of the State Supreme Court became final and executory and some 28 days *before* this petition for a writ was filed. Petitioner, on April 7th, some 18 days after this petition for a writ was filed, and 46 days after the moneys were transferred from this segregated account, applied for a stay of execution of the judgment of the Louisiana Supreme Court. The ex parte order obtained by petitioner is annexed as Appendix II. Respondent, will in due course, seek a hearing and reversal of this ex parte action.

ARGUMENT

I.

Under the facts of this case, there is no subject matter upon which the judgment of this court can operate, and any opinion rendered herein would of necessity be advisory only.

When petitioner made no effort to apply for writs or to stay execution of the judgment of the Louisiana Supreme Court, respondent transferred the funds from a non-expendable segregated fund into the State Treasury where they since have been expended in the operation of the State government.

It is submitted that had an appeal been filed, a motion to dismiss would be in order upon the basis of the following statement in the case of *Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132, 133, 40 L.Ed. 293:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the

appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord v. Veazie*, 8 How. 251; *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 13 Sup. Ct. 876."

See also, *Brown-Forman Distillers Corporation v. Collector of Revenue*, ...U.S....., 79 S.Ct. 602 (1959).

Certainly, if an appeal, a matter of right, be dismissed, a petition for certiorari, which lies within the sound discretion of this Court, should be denied.

Respondent cannot now recover the taxes paid under protest because they were paid into the Treasury in the absence of any effort by petitioner to obtain a stay of execution. Thus, it is also submitted that any opinion rendered herein would be advisory only. This would do violence to the fixed principle of constitutional law that the Supreme Court will not render advisory opinions. *Ashwander v. T. V. A.*, 297 U.S. 288, 56 S.Ct. 466 (1936).

As recently as 1951, in the case of *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America, Division 998, et al. v. Wisconsin Employment Relations Board*, 340 U.S. 416, 418, 71 S.Ct. 373, this Court reiterated that principle saying:

"It is argued that the Wisconsin Courts have adopted a practice of deciding questions of importance even though the case has become moot, and we are urged to follow that same practice. But whatever the practice in Wisconsin courts,

'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *United States v. Alaska S. S. Co.*, 253 U.S. 113, 115, 116, 40 S.Ct. 448 (449), 64 L.Ed. 808, and cases cited; *United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U.S. 466, 475-477, 36 S.Ct. 212, 216, 60 L.ED. 387.' *St. Pierre v. United States*, 1943, 319 U.S. 41, 42, 63 S.Ct. 910, 911, 87 L.Ed. 1199."

II.

There is no new or important federal question to be decided. Petitioner merely seeks a reversal of the *Georgia* and *Minnesota* cases. (infra)

Such an attempt is not novel, but a similar effort was rejected by this Court earlier this year in the *Brown-Forman Case*, supra. In dismissing that appeal, this Court went on to say:

"Treating the papers whereon the appeal was taken as a petition for certiorari; *certiorari is denied.*" (emphasis added).

The State Supreme Court noted and rejected this effort to use an attempted factual distinction, lack of an office, to justify a reversal when no new Federal questions are presented in a state income tax case.

"In its brief, appellant does not directly assail the ruling in the Hay case (Fontenot v. John I. Hay, Co. 228 La. 1031, 84 So. 2nd 810) *but seeks to distinguish it* from the instant matter on the ground that, there, the taxpayer per-

formed extensive service in Louisiana, *maintaining an office* and staff of employees in this state and using waterways for the operation of its craft." (emphasis supplied) *Brown-Forman Distillers v. Collector of Revenue*, 234, La. 651, 101 So. 2nd 70, 72 (1959)

Respondent respectfully submits that petitioner herein seeks to achieve the very same thing denied the *Brown-Forman* people by this Court earlier this year. In a case with identical issues, certiorari is not justified on the basis of an attempted factual distinction.

Despite petitioner's contention that a new issue is present (Petitioner's brief, p. 3), and transcending the skillful use of "sales dodgers" employed by various purveyers of publications and services (Petitioner's brief, pp. 11, 12 and 13), it is clear that primarily petitioner seeks a reversal of two recently decided cases, viz: *Northwestern States Portland Cement Company v. Minnesota*; *Williams v. Stockham Valves and Fittings, Inc.*..... ..*U.S.*..... 79 S.Ct. 357 (1959).

For example, on page 4 of petitioner's brief we find this statement:

> "(7) The federal questions here at issue have been more fully stated in the dissenting opinion of Mr. Justice Whitaker, Mr. Justice Frankfurter and Mr. Justice Stewart in the two cases above cited, which dissenting opinion is hereby adopted by reference. It is the position of petitioner (respectfully) *first* that the majority

opinion of the Supreme Court was in error; that the dissenting opinion reached the correct and proper conclusion; and, *second*, in the alternative, that the present case is distinguishable from the two cited cases for the reason, inter alia, that International Shoe Company '. . . had no office, storage space, warehouse or other place of business in Louisiana . . .' Stipulation par. 7, (R. 20)."

Again, petitioner, on page 9 of his brief says:

> "Petitioner adopts the dissenting opinion of Mr. Justice Whitaker, Mr. Justice Frankfurter and Mr. Justice Stewart, in the *Georgia* and *Minnesota* cases as its basic argument. Petitioner submits that the rationale of that dissent is correct, that the majority opinion is in error."

Petitioner cites no authorities and makes no extended argument, saying only:

> "We adopt by reference (as our argument) the dissenting opinion of Mr. Justice Whitaker, Mr. Justice Frankfurter and Mr. Justice Stewart, in the *Georgia* and *Minnesota* cases cited above." (Petitioner's brief, p. 17.)

There is no new question to be decided in this proceeding despite petitioner's clever series of *Queries*. Plaintiff may plead no one's cause but his own. *Del Castillo v. McConnico*, 168 U.S. 674, 18 S.Ct. 229 (1898).

III.

The decision below, particularly in the light of the *Georgia* and *Minnesota* cases, is eminently correct.

As petitioner's brief points out on page 4, there are only two issues in this case.

Does a properly apportioned net income tax, when applied to income derived from interstate commerce, violate the commerce clause of the Federal Constitution?

Does such a tax violate the due process clause of the Federal Constitution?

The first question was clearly and unequivocally answered in the *Georgia and Minnesota* cases, by this Court saying at page 362 of 79 S.Ct.:

> "On the other hand, it has been established since 1918 that a net income tax on revenues derived from interstate commerce does not offend constitutional limitations upon state interference with such commerce."

The second question was also answered with these words at page 365 of 79 S.Ct.:

> "Nor will the argument that the exactions contravene the Due Process Clause bear scrutiny. The taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State. These activities form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.' *Wisconsin v. J. C. Penney Co.*, supra, at 445. It strains reality to say, in terms of our decisions, that each of the corporations here was not sufficiently involved in local events to forge 'some definite link, some minimum connection' sufficient to satisfy due process

requirements. *Miller Bros. v. Maryland*, 347 U.S. 340, 344-345 (1954). See also *Ott v. Miss. Valley Barge Line*, 336 U.S. 169 (1949); *International Shoe co. v. Washington*, 326 U.S. 310 (1945); and *West Publishing Co. v. McColgan, supra.*"

True, petitioner would have you conclude that he had only minimal contacts with the state. The record shows otherwise. The regular and systematic solicitation of over fifteen million dollars of business volume by 15 salesmen and their method of activity (R. 18-21 and particularly paragraphs 11-13 of the stipulation of facts), is clearly a sufficient nexus.

In fact, the activities of petitioner, are to all intents and purposes, identical with its activities in the case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which was cited in answer to the due process argument advanced in the *Georgia and Minnesota* cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Robert L. Roland
Counsel for Respondent

April ____, 1959

Appendix I

Additional Statement Facts.

Appendix II

Ex parte Order for Stay of Execution and Stay of Mandate, Arrest of Judgment, and Writ of Mandamus issued by Louisiana Supreme Court.

PROOF OF SERVICE

I, Robert L. Roland, attorney of record for respondent in this matter and a member of the bar of this Court, do certify that a copy of this brief was served upon petitioner by depositing same this_____ day of April, 1959, in the United States post office, first-class postage prepaid, addressed to the Honorable B. B. Taylor, Jr., attorney of record for petitioner, at 1100 Louisiana National Bank Building, Baton Rouge, Louisiana.

ROBERT L. ROLAND

APPENDIX I

ADDITIONAL STATEMENT OF FACTS

These facts developed after the rehearing was denied by the Louisiana Supreme Court on January 12, 1959, and are therefor not in the record.

1. Mr. Roland advised the Cashier's Division and the Income Tax Division on February 3, 1959, that the International Shoe Company litigation had been terminated and requested that the divisions take appropriate action to transfer the funds from a segregated account into current collections.

2. On February 23, 1959, Mr. Ben A. Grasser, Head, Office Audit Section, Income and Franchise Tax Division, authorized Mr. A. E. Frederic, Chief of the Cashier's Division, to transfer the $4,936.42 involved from a segregated account into current collections.

3. On February 23, 1959, the transfer was accomplished by transfer No. 501, Check No. 5030.

4. On April 8, 1959, respondent was served with an ex parte order for Stay of Execution, Arrest of Judgment and Writ of Mandamus, dated April 7, 1959, as is more fully set forth in Appendix II.

APPENDIX II

(Stamped) Received Apr. 8 1959 Sheriff's Office Baton Rouge, La.

SUPREME COURT OF LOUISIANA

No. 44,126

INTERNATIONAL SHOE COMPANY,
Plaintiff and Appellant

VERSUS

COLLECTOR OF REVENUE,
Defendant and Appellee

ORDER FOR

(1) Stay of Execution and Stay of Mandate
(2) Arrest of Judgment, and
(3) Writ of Mandamus

On consideration of the petition and motion of International Shoe Company, plaintiff-appellant in the above numbered and entitled cause:

IT IS ORDERED that the execution and mandate and enforcement of the judgment and decree rendered in the above entitled and numbered cause shall be, and it is hereby, stayed pending and until the final disposition of this case by the Supreme Court of the United States of America, and said judgment is hereby arrested, pending such final disposition, and Robert L. Roland, Collector of Revenue of the State of Louisiana, is hereby enjoined from taking any steps whatsoever toward or in the interest of any execution of said judgment in any manner whatsoever, and

IT IS FURTHER ORDERED that, in the event the said Collector of Revenue has, directly or indi-

rectly, transferred or in any manner removed from the status of segregation provided by Louisiana Revised Statutes of 1950, RS 47:1576, any of the moneys which are the subject of this litigation, he is hereby ordered and commanded by this writ of mandamus to retransfer all of said moneys and funds into such a status of segregation, as required by said statute, and is commanded to thereafter retain and hold said moneys and funds in such status of segregation, and in escrow, pending and until the United States Supreme Court shall have made its final disposition of this case.

New Orleans, Louisiana, this 7 day of April, 1959.

s/ JOHN B. FOURNET,
Chief Justice of the Supreme Court,
State of Louisiana

A TRUE COPY
Clerk's Office, New Orleans, April 7, 1959
HAROLD A. MOISE, JR.
Dy. Clerk Supreme Court of Louisiana

Filed April 8, 1958
(Signed) Ruth White
A True Copy April 8, 1959
s/ Ruth White
Dy. Clerk